45577 SERVICE DATE – JANUARY 25, 2017
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36042

CL CONSULTING AND MANAGEMENT
CORPORATION—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board denies the petition for declaratory order filed by CL Consulting and Management Corp. (CLC) because this dispute over demurrage charges is currently still pending in the United States District Court for the District of New Jersey, and the district court denied CLC's motion to refer issues associated with the demurrage charges to the Board.

Decided: January 23, 2017

On June 10, 2016, CL Consulting and Management Corp. (CLC) filed a petition for declaratory order claiming that collection of certain demurrage charges by Norfolk Southern Railway Company (NSR) constitutes an unreasonable practice in violation of 49 U.S.C. § 10702(2). On July 29, 2016, NSR replied in opposition to the petition. On July 6, 2016, CLC filed a motion for leave to reply and a reply.[2] For reasons discussed below, the Board will deny CLC's petition for declaratory order.

BACKGROUND

NSR has filed suit in the United States District Court for the District of New Jersey to collect from CLC, a reseller of liquid asphalt cement,[3] approximately $579,000 in unpaid

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] NSR filed a response in opposition to CLC's motion on July 12, 2016, citing 49 C.F.R. § 1104.13(c), pursuant to which a reply to a reply is not permitted. However, in the interest of a more complete record, we will grant CLC's request and will accept its July 6, 2016 reply into the record.

[3] CLC has and maintains no location or facility to receive, handle, and unload rail cars containing asphalt. (CLC Pet. 2.) Instead, CLC, through an affiliate, has a contractual relationship with another company, which receives and unloads the rail cars at its terminal in Elizabeth, N.J., on behalf of CLC. The petition is unclear whether that company is New York

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demurrage fees for storage of tank cars containing liquid asphalt.[4] (CLC Pet. 1, 3.) In that litigation, CLC moved to refer the matter to the Board pursuant to the primary jurisdiction doctrine for a determination of whether NSR had engaged in unreasonable practices related to the fees. (CLC Pet. 3.) The court denied the motion on January 11, 2016, finding that "this matter appears to be a routine demurrage fee case. Indeed, the courts of the Third Circuit are well-experienced in resolving such demurrage cases." (NSR Reply, Ex. A at 8-9.)

In its petition before the Board, CLC argues that NSR's assessment of demurrage fees is an unreasonable practice. CLC claims that NSR failed to comply with the terms of its tariff by not providing notice of constructive or actual placement of the cars to CLC, and by refusing to eliminate the demurrage fees due to severe weather. (CLC Pet. 10-12.) CLC also claims that NSR should not have assessed a higher level of demurrage on the ground that the asphalt constitutes a hazardous material. (Id. at 10; CLC Reply 4-8.) CLC explains that asphalt was heated to enable loading into railcars, and that it is because of this elevated temperature that the Pipeline and Hazardous Materials Safety Administration (PHMSA) has classified it as a hazardous material. However, CLC argues that, although the asphalt was properly designated as hazardous at the time it was shipped, the asphalt had cooled by the time it reached its destination. Accordingly, CLC argues that the asphalt was no longer a hazardous material at the point in time when demurrage fees were assessed. As a result, CLC claims, NSR's assessment of fees for hazardous materials storage is unreasonable.

NSR replies that the Board should deny the petition for declaratory order because the district court denied the motion to refer, finding that it was fully capable of resolving the case. (NSR Reply 9-10.) NSR notes that the district court litigation is well underway, with a considerable record already developed and discovery in progress. (Id. at 10-11.) NSR also argues, relying upon regulations promulgated by PHMSA (see 49 C.F.R. Parts 171-74), that CLC's claim that the hazardous material fees are unreasonable has no merit because the shipper is responsible for identifying hazardous materials upon shipment, and NSR is not obligated to reassess that identification after shipment. (Id. at 13-14.)

In its reply to NSR's reply, CLC responds that the hazardous material issue is a question of first impression over which the Board has primary jurisdiction, and the issue had not been raised at the time the district court ruled on the motion to refer. CLC states that "[a]t no point has CLC or any other party . . . ever requested that the court refer this specific issue to the Board pursuant to the primary jurisdiction doctrine" and argues that the Board may exercise its primary jurisdiction in the absence of a referral. (CLC Reply 4.)

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Terminals, LLC, or NY Terminals II, LLC d/b/a New York Terminals. (Id. at 2, V.S. Rose 2.) Those two companies jointly filed a comment in support of CLC's petition on July 12, 2016.

[4] The litigation against CLC was commenced in 2015 in Case No. 2:15-CV-02548. (CLC Pet. 3.)

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. See, e.g., Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989). However, the Board has declined to issue a declaratory order where a court has concluded that a referral to the Board is unnecessary. See Nat'l Solid Wastes Mgmt. Ass'n—Pet. for Declaratory Order, FD 34776, slip op. at 4 (STB served Mar. 10, 2006); Green Mountain R.R.—Pet. for Declaratory Order, FD 34052, slip op. at 4 (STB served May 28, 2002).

The petition for declaratory order will be denied. The parties are currently engaged in litigation in the district court with regard to their dispute. The district court considered the argument that the unreasonable practice claims should be referred to the Board and declined to do so. Denial of the petition is therefore consistent with the Board's previous decisions to deny petitions for declaratory orders under similar circumstances in National Solid Wastes Management Association and Green Mountain Railroad.

CLC argues that the hazardous materials issue, which it did not raise before the district court until after the court had denied CLC's referral motion (see NSR Reply, Ex. C at 4), is one over which the Board has primary jurisdiction. This argument is not persuasive. The primary jurisdiction doctrine allows a court to refer issues to an administrative agency for resolution when such issues are within the special competence of that agency. CSX Transp. Co. v. Novolog Bucks County, 502 F.3d 247, 253 (3d Cir. 2007). It is a flexible mechanism that allows courts to refer issues to agencies depending upon the facts and circumstances of each case. See United States v. W. Pac. R.R., 352 U.S. 59, 64, 69 (1956); Pejepscot Indus. Park, Inc. v. Maine Cent. R.R., 215 F.3d 195, 205 (1st Cir. 2000). Here, as noted, the hazardous materials issue is already before the district court. (See NSR Reply, Ex. C at 4.) The district court, which has already considered and rejected another argument by CLC regarding the primary jurisdiction doctrine, (NSR Reply, Ex. A at 8-9), is capable of determining whether the hazardous materials issue should be referred pursuant to the primary jurisdiction doctrine.[5] Additionally, although CLC argues that the commodity at issue is not a hazardous material subject to regulation by PHMSA, NSR has raised the argument that this issue may involve interpretation of PHMSA's regulations.

[5] Moreover, the federal courts have experience in handling cases brought by rail carriers for unpaid transportation service charges, such as demurrage fees, as the Interstate Commerce Act provides for rail carriers to bring such claims only by civil action in court. See 49 U.S.C. § 11705(a); Pejepscot Indus. Park, Inc., 215 F.3d at 199 (interpreting § 11705(a) as permitting civil actions by rail carriers to recover payment for services provided); Demurrage Liability, EP 707, slip op. at 2 (STB served May 7, 2012) ("Demurrage collection cases may only be brought in court . . .").

(CLC Pet. 5; NSR Reply 13-14.) That interpretation would typically not be a matter for the Board. See, e.g., Tyrell v. Norfolk S. Ry., 248 F.3d 517, 523 (6th Cir. 2001) (distinguishing between the statutory responsibilities of the Board and of federal safety regulatory agencies).

Under these circumstances, the district court is better situated to determine whether referral of the hazardous materials issue, which may involve interpretation of PHMSA's regulations, is necessary pursuant to the primary jurisdiction doctrine or would otherwise be helpful.

It is ordered:

1. CLC's July 6, 2016 filing is accepted into the record.

2. The petition for declaratory order is denied.

3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.